

Berkman v. U.S. Coast Guard Academy, 97-CAA-2
(ALJ Jan. 2, 1998)DOL/OALJ REPORTER Berkman v. U.S. Coast Guard Academy
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Date: January 2, 1998

Case Nos.: 97-CAA-2 and 97-CAA-9

In The Matter Of:

PAUL BERKMAN
Complainant

v.

U.S. COAST GUARD ACADEMY
Respondent

For the Complainant:
Scott W. Sawyer, Esq.
New London, Connecticut

For the Respondent:
William G. Haskin, Esq.
Norfolk, Virginia

Before:
DAVID W. DI NARDI
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This is a proceeding under the Clean Air Act , 42 U.S.C. 7622; the Federal Water Pollution
Control Act or Clean Water Act, 33 U.S.C. 1367; the Toxic Substances Control Act,

15 U.S.C. 2622; the Comprehensive Environmental Response, Compensation and Liability Act,

42 U.S.C. 9610 and the Solid Waste Disposal Act or Resource, Conservation and Recovery Act, 42 U.S.C. 6971 (collectively referred to as the whistleblower statutes) and the implementing regulations found in 29 C.F.R. Part 24. An initial complaint dated September 18, 1996 (ALJ EX 1), identified as 97-CAA-2, was filed by Complainant pursuant to the aforementioned whistleblower statutes. This complaint alleges Respondent retaliated against the Complainant for reporting the North Site when it revoked Complainant's signature authority and told Complainant that he was no longer the Academy's Environmental Engineer in retaliation for Complainant's reporting to the Connecticut Department of Environmental Protection (hereinafter CT DEP) an area of land known as the North Site. A subsequent complaint dated February 3, 1997 (ALJ EX 26) was filed by Complainant and has been identified as 97-CAA-9. (ALJ EX 27) This complaint alleges continuing harassment based on Complainant reporting the North Site, which harassment culminated in a January 8, 1997 Notice of Proposed Removal. A hearing was held by the undersigned Administrative Law Judge in New London, Connecticut on August 25 - 29 and September 2 and 4, 1997. This Judge, having duly considered all the evidence of record, hereby RECOMAND that the Respondent be found to have violated the whistleblower statutes and that Respondent be ORDERED to remit damages, as specified in Section III of this Recommended Decision, to Complainant.

Post-hearing evidence has been admitted as follows:

CX 118	Complainant's Compliance With Court Order with	11/02/97
CX 119	Letter dated October 30, 1997 from Sylvia Rasie, APRN enclosed	11/02/97
CX 120	Complainant's Post-Hearing Brief	11/12/97
EX 11	Respondent's Post-Hearing Brief	11/12/97

The record was closed on November 12, 1997 as no further documents were filed.

I. Summary of the Evidence

This case focuses around an area of land known as the North Site. It is located at the U.S. Coast Guard Academy, and is owned by the U.S. government. The North Site is comprised of two parcels of land, both of which are located on the Thames River at the north end of the Academy. One parcel is located north of the Thames Shipyard and the other parcel is located south of the shipyard and north of the Academy's rowing center. (EX 11) The witnesses at hearing referred generically to the North Site, and it was clear that they were speaking of the area located between the shipyard and the rowing center. (TR 301) The surface area was described as strewn with metal scraps, timber, metal cans, glass, rusted metal, and a vegetation-less plateau of sand. (TR 468) There was also visible sand blast grit and an abandoned oil truck.

In the summer of 1992, workers from the Academy's grounds shop unearthed barrels on the North Site. (TR 122-123, 317-318) One witness described a barrel from which he saw and smelled a noxious smelling liquid emanating (TR 161, 174) and another specifically testified that he brought the North Site to the attention of various supervisors in 1992. (TR 294-295) He also

recalled Lieutenant Commander Smith going to the North Site and the fact that he never generated a report as to his observations. (TR 295) A test of the area was done in 1992, although the grounds shop was not informed of the test results until 1996. When informed of the results, however, one witness stated the lead values seemed extremely high. (TR 163) There was significant activity on the North Site in the spring of 1997. (See Generally CX 27) Witnesses described many men in white uniforms and air masks who worked in the area for at least a week digging up earth and dumping it in long dumpsters that were then hauled away. One witness, Mr. Earl Marek, whose testimony is summarized below, surmised that the environmental crew was searching for the drum that Mr. Marek had dug up in 1992. Mr. Marek further described two large holes, one which appeared like a big, deep crater that had a keel in it. (TR 305) Mr. Paul David Berkman, who was retained as Environmental Engineer, GS-819-12, worked at the Academy from October 1993 until February 1997. The parties have stipulated to Complainant's background in the environmental compliance field, which is supported by Complainant's testimony as to his education and professional experience and by Lt. Opstrup's testimony as to the extent to which he relied upon Complainant for information and expertise. (TR 449, 470, 565-569, 575-576) It is appropriate, however, to pause to briefly note the extensiveness of Complainant's experience in the area of environmental compliance because it bears on the reasonableness of his belief that the North Site had to be reported. Complainant has a bachelor of science degree in biochemistry and a masters in chemical engineering. He has done some graduate assistantships in chemistry and has been published. He has taken "dozens and dozens of environmental courses, so numerous" he just could not remember them all at hearing, but described them as compliance programs for a number of different environmental statutes, including the RCRA, CERCLA, TSCA, CWA, and CAA. (TR 565-566) Among other professional experience, Complainant was an Environmental Protection Specialist covering solid waste issues at Chief Naval Operations at the Washington Navy Yard; an Environmental Engineer at Naval Facilities Engineering Command; and a Chemical Engineer, responsible for chemical process work at an activity level, at the Naval Warhead Station, Indian Head. (TR 566-569; CX 21) Chemistry was essential to these various positions because each required familiarity with chemical terminology. As this Judge noted at hearing, the evidence is clear in establishing that Complainant was a hard working, conscientious individual who attempted to do his .

Lt. Timothy Opstrup, presently employed by General Electric as a commodity sourcing engineer, has a degree in civil engineering from the Coast Guard Academy and was an environmental officer from July 1995 through 1997. As an environmental officer, Mr. Opstrup had to keep the Academy in environmental compliance and he was assisted by Complainant, whom he described as a "great resource for answering questions." (TR 449) Indeed, Mr. Opstrup's reliance upon Complainant was so great that Complainant had to help him decipher the lab results commissioned by Mr. Frey. (TR 470) Lt. Opstrup recalled that Complainant raised concerns over the document and that he recommended that the Site be reported and that the legal office was consulted and it determined that the Site did not have to be reported. The Site was put on backlog to clean up in the future. (TR 471)

Complainant was the only environmental engineer I at the Academy and, as such, he was required to ensure environmental compliance. (TR 1016-1017) Indeed, Captain Florin testified that Complainant was responsible as the "technical expert" at the Academy to maintain

and ensure environmental compliance and to advise his superiors as to their projects' compliance. (TR 1048-1049) Complainant's Position Description (CX 7) for his position at the Academy summarized that Complainant would be "responsible for the activities of the [Respondent] to ensure compliance with all applicable environmental regulations and design criteria." Complainant took the "ensure compliance" language very literally and was of the opinion that it meant that he was going to ensure compliance by recommendations, resolutions of problems, and actions. (TR 582) Complainant testified factor meant to Complainant that he had the right, pursuant to his job description, to contact people inside and outside the Academy. (TR 583) From his past experience, Complainant stated that if he could not contact and talk with people outside the Academy, he would not be able to get his job done. (TR 583)

An understanding of the Academy's chain of command is essential to an understanding of this case, for it is this chain of command that allegedly frustrated Complainant's performance of his duties as environmental engineer. The chain of command is used for grievance purposes and/or to communicate a concern to one's supervisor. One witness noted that in order to get past one's immediate supervisor with a concern, you would probably have to file a grievance. Complainant's chain of command proceeded as follows: his first line supervisor was Lieutenant James Keith Ingalsbe, who was later replaced by Lieutenant Timothy Opstrup; his second line supervisor was Mr. Greg Carabine; his third line supervisor was the facility engineering chief, Commander Bellona, who was later replaced by Commander Jeffrey A. Florin; his fourth line supervisor was the assistant superintendent, Captain Laraby, who was later replaced by Captain Olsen, then by Captain Florin; and his fifth line supervisor was Admiral Paul E. Versaw. While this was the line of command "on paper," there was testimony that Mr. Carabine had a habit of running things directly. (TR 351)

There was also a great deal of testimony as to Mr. Carabine's management style, a style which is relevant to the issue of whether Complainant was being treated differently than other Academy employees and whether or not the animosity between Complainant and Mr. Carabine is attributable to Complainant's protected activity. Mr. Carabine was described as someone who yells frequently, is "by nature abrasive," and as someone who is "pretty rough with most folks." (TR 485, 549, 864)

Captain Florin described Mr. Carabine's management style as stern or strict. (TR 1012) In the Captain's opinion, Mr. Carabine treated everyone in the office equally. The Captain testified that Complainant appeared "intimidated" by Mr. Carabine's management style (TR 1013) and that the two of them definitely did not get along well. In fact, on March 21, 1996, Complainant informed Captain Florin that he could no longer work under Mr. Carabine. The Captain responded by stating he would reorganize the environmental office so that Mr. Carabine would have no authority over Complainant. (CX 48) This reorganization, however, never happened. There was also evidence as to at least one other occasion during September or October 1996 on which Complainant expressed concern about his professional relationship with Mr. Carabine to the Captain and informed the Captain that Mr. Carabine was harassing him. (TR 1013) The Captain testified, however, that once he and Complainant discussed the conduct, they basically agreed that it was "rude behavior." (TR 1013) The Captain instructed Mr. Carabine to keep a little distant from Complainant. (TR 1014)

As far as concerns Complainant's relationship with the Captain, Lt. Opstrup stated that although he never noticed any tensions between Complainant and Captain Florin, he is sure that Complainant perceived some. (TR 549) In this regard, a March 14, 1996 e-mail from Captain Florin to Lt. Opstrup (CX 19) reflects the Captain's perception that Complainant and a fellow employee had spun up the idea that the Captain was Attila the Hun. According to Lt. Opstrup, however, the Captain did not treat Complainant differently than he treated everybody else. (TR 549) Lt. Opstrup stated he did not personally have any problems with Complainant, although he offered the opinion that Complainant was not "very apt to trying to listen to the other side"; once he made up his mind (TR 518) and that Complainant had a hard time getting his knowledge across without appearing confrontational. (CX 116, at p. 56)

Complainant would make his recommendations to ensure compliance up through his chain of command. Complainant described "many, many recommendations that were ignored consistently" (TR 587) and his frustration that clear cut compliance issues were not handled properly. Complainant stated there may have been a few recommendations of his that were followed after a lag and some resistance, but most of them were not. (TR 587, 790) Complainant is aware that environmental issues were backlogged and requests for funding were made. Complainant is aware that there were, at times, trouble getting money. (TR 793) Complainant also states, however, that most of what he asked for did not present a funding issue. Furthermore, funding and fund prioritizing should have nothing to do with reporting an environmental site. (TR 828-829)

Sometime in 1994, while Complainant was familiarizing himself with the Academy, he discovered a preliminary assessment of the North Site that was done in 1993 and a copy of the sampling results that Attorney Doug Frey, Complainant's predecessor in the environmental compliance area, had initiated sampling of in 1992. (TR 597) (CX 28c) Complainant knew in 1994, upon reviewing these documents and actually going down to the North Site and observing sandblast grit, that a reportable quantity had been exceeded. (TR 598-599, 708) Consequently, Complainant drafted an October 18, 1994 memorandum to Lt. Ingalsbe (CX 30a) advising that the North Site was required to be reported pursuant to CERCLA. Complainant also provided a letter to comply with the reporting requirement (CX 28d), which was re-drafted a number of times. (CX 28e) The letter was never approved and never sent out of the Academy. Complainant testified he also made Captain Florin aware of his opinion that the North Site should be reported very shortly after the Captain's arrival at the Academy. (TR 1027) The Captain, however, testified he made inquiries and determined, upon evaluation of the advice, that the Site need not be reported. (TR 1030) Specifically, the Captain arrived at his decision that the Academy did not need to report the North Site based on the sample results and the regulations. (TR 1025) The Captain denied Complainant's suggestions that the Site was not reported because the Academy feared fines or adverse media coverage or because the Captain feared his career was at stake. The Captain also denied that the decision had anything to do with a cover-up. He did, however, admit to telling Complainant that the Academy did not have the same resources as the Navy, a statement which inferentially refers to a funding issue. The Captain admitted at hearing, however, that funding is not an excuse for not reporting an environmental waste site. (TR 1031)

Complainant also expressed to the Captain his concern about personal liability for failure to report the North Site. (TR 1034) The Captain, however, never considered this fear as a contributing factor to Complainant's sporadic work schedule. Instead, the Captain asked Complainant whether he knew anyone who had actually been put in jail for an environmental violation, but denied asking Complainant whether or not Complainant really thought that could happen to him. (TR 1037) The Captain does not recall telling Complainant that he should not be losing sleep over the North Site, but does recall stating that he, the Captain, would take the blame. (TR 1037) The Captain explained this statement was made in the context of his explaining to Complainant that the Academy made the choice on all the evidence it had and despite Complainant's recommendations.

The Work Environment

Complainant conducted quite a bit of hazardous material (hereinafter HAZMAT) training in 1994, which he testified was eventually cut back by Captain Florin, who allegedly told Complainant that he did not want Complainant doing the training anymore. (TR 594-595) Complainant recalled speaking with Mr. Chuck Carey, a grounds shop employee, about the North Site during one of these meetings. Complainant recalled being concerned about the possible immediate threat to people and the environment. Complainant also recalled Mr. Carey's concerns about possible exposure. Complainant testified that he approached Lt. Ingalsbe "immediately" after that conversation and that Lt. Ingalsbe stated he was aware of the drums at that location. (TR 596) The Lieutenant allegedly assured Complainant that the situation had been taken care of (TR 596) and that was the end of the conversation.

Mr. Charles Carey, who has a Bachelor's degree in metallurgy, the science of metals, continues to be employed by Respondent as a gardener leader. According to Mr. Carey, Complainant's position as the person in charge of hazardous material control was developed "in the early 1992 period after [the Respondent was] threatened with fines for having hazardous materials around the Academy that were uncontrolled." Mr. Carey recounts, in Admiral Versaw's words, that since the Academy was "negligent" in the environmental compliance area, the Admiral decided to beef up hazardous material control. (TR 118) Lt. Ingalsbe was made the officer in charge and Complainant was brought in for his technical expertise.

Mr. Carey believes he was labeled a troublemaker for bringing a number of different matters to the Respondent's attention and/or to the attention of other appropriate authorities when the Respondent would not respond. (TR 146-147) Mr. Carey has filed 12-14 grievances over six years; in his own words, "more than anyone else, I'm sure." (TR 165) Mr. Carey does not recall being yelled at concerning the North Site. In fact, Mr. Carey does not recall that he ever asked to have the North Site cleared; although, he notes, he often expressed safety concerns and hazardous material concerns during his six-plus years at the Academy. (TR 140-141)

Mr. Carey first became familiar with Complainant in the Spring of 1993 when r. Carey attended a HAZMAT training seminar. Mr. Carey asked Complainant, at the time of this training seminar, whether Complainant was aware of the area where he and co-workers had unearthed barrels. Mr.

Carey stated he was sure that he encountered Complainant at yearly training sessions and that he mentioned the North Site to Complainant every time. Complainant has expressed concerns to Mr. Carey about the North Site. (TR 134)

In March of 1996, Mr. Carey was at the North Site and noticed the fence he had been instructed to raise and the signs he had been instructed to hang (CX 113), were gone. He brought this to Lt. Opstrup's attention (CX 112) and was instructed, in April 1996, to reinstall the fence and signs as they had been before. (CX 56)

In June of 1996, Mr. Carey and a fellow employee had occasion to be in Captain Olsen's office for a meeting. At the end of that meeting, the other employee raised the issue of the North Site. Mr. Carey recalled "Captain Olsen was very upset that we brought the subject up." (TR 151)

There was another meeting, HAZMAT refresher course (TR 145) or training session led by Complainant on or about May 30, 1996. Eric Adams, one of Mr. Carey's fellow gardeners, raised a question in regards to the North site and the potential contamination employees might have been exposed to while working there. (TR 143) Mr. Carey recalled Complainant informed the employees during that meeting that the lead value was 2,000 parts per million and that this value exceeded the allowable limit. (TR 143) Mr. Carey did not get the feeling that Complainant was trying to make himself the hero and slam management. (TR 188) All of Mr. Carey's knowledge about the North Site, which he acquired during the training sessions, is from Complainant. (TR 181)

The next day, May 31, 1996, there was a meeting in Mr. Opstrup's office concerning the North Site. (TR 146; CX 62) Complainant was a totally changed person within a few weeks after that meeting. (TR 183, 191)

Mr. Eric Roy Adams, another grounds shop employee, first met Complainant in 1994 when they were formally introduced during HAZMAT training. (TR 199) During the last HAZMAT training that was conducted by Complainant, which was held sometime in 1996, Mr. Adams asked Complainant a question concerning the 55 gallon drum or barrel he had previously dug up a name and was informed that the levels of lead were high. Mr. Adams had previously posed questions to NLC people, an acronym left undefined, people Mr. Adams described as from Governor's Island or Virginia, and was privately informed that 'chances were' that nothing down there had affected his health. (TR 203)

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 Mr. Adams recalled that Mr. Carey questioned Lt. Opstrup about the barrels in the end of 1995 and that he never got a straight answer. Mr. Carey got a letter back and was led to believe the Site had been turned in to the state or DP. Mr. Adams did not raise the North Site issue again until he was in Captain Olsen's office. Mr. Adams described Captain Olsen as becoming "uptight a little bit." (TR 205) The Captain commented that there was not enough money to dig up the Site, and this concerned Mr. Adams because on the one hand he had people telling him there were no health concerns and on the other hand he was being told it would cost substantial money to clean it up. (TR 205-206)

On May 1, 1996, Complainant complained of another act of reprisal (CX 59), his removal from the Tank Consolidation Project. He asserted that Mr. Carabine's actions were "clearly based on his personal hatred and bigotry." A June 20, 1996 conversation between Complainant and the

EEO counselor indicated that Mr. Carabine wanted to apologize for the religious discrimination and that Mr. Carabine had informed the EEO counselor that Complainant was removed from the Tank Consolidation Project because he lacked the proper skills and training. (CX 64)

On August 21, 1996, Complainant sent a memorandum to Earl Marek (CX 72), in which Complainant reiterated his opinion that there was the potential for harmful health effects and stated that no one should be on the contaminated property without proper training and protective equipment. Complainant further wrote "any information given to you by any other source which contradicts the above does not represent my expertise or experience with uncontrolled waste sites."

<I>The Letter to CT DEP</I>

 By the time of Complainant's departure from the Respondent, the Respondent wanted to keep anything to do with the North Site away from Complainant. Complainant testified the Respondent asked the representative from CT DEP to send correspondence in plain brown envelopes so that Complainant would not be able to identify it and, therefore, not try to get a hold of it. (TR 828) There was no action taken as a result of Complainant calling in the North Site (TR 1084), i.e., the State never came out and looked at the Site and the Academy never received any fines or sanctions as a result of not reporting. (TR 1084)

[illegible]

 On this same day, Complainant spoke with Mike McCain, CT DEP Waste Management Bureau, and Mr. McCain instructed Complainant as to the correct address to send the letter. (TR 730) (CX 74) Complainant believes a lady at the remediation branch told Complainant to report to the State in writing. Again, she never asked him if he was reporting in his official or personal capacity. (TR 799) Complainant summarized his conversation with Mr. McCain in a memorandum to Lt. Opstrup. (CX 74)

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Complainant's cubicle. Ms. Campbell had no knowledge of the location of those file cabinets at the time of hearing. Ms. Campbell, who keeps an open access file of all environmental correspondence, was asked by Respondent if she had any environmental letters. Shortly before hearing, an employee from the Academy went through all her files "going crazy"; looking for a letter that was supposedly written to the State DEP, although she does not know by whom, in January 1997. (TR 913)

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Complainant candidly admits that he never had by direction of authority. (TR 778, 830-831) According to the Captain, the letter sent by Complainant to CT DEP did not state that he had by direction of authority. (TR 1061) **B** Therefore, the testimony from all witnesses as to precisely what by direction of authority is and whether the letter amounted to an exercise of it, is irrelevant. There was, however, testimony as to the existence of an office policy for letters going outside the Academy. This unwritten policy required the letter go through Captain Florin or Mr. Carabine. (TR 544)

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Complainant's testimony that he signed letters going outside the Academy on letterhead is controverted by Lt. Opstrup, who testified that although it was not a problem to sign internal memos and manifests²⁰ (TR 542-541), Complainant was not allowed to sign documents going outside the Academy on Respondent's letterhead. Complainant explained that he went through Lt. Opstrup sometimes in communicating with the shops because it was a matter of convenience and it would help the Lieutenant understand what was going on. (TR 811) The Lieutenant, who is not aware of Complainant previously using Respondent's letterhead, held the opinion that it was not appropriate for Complainant to send this letter with the title he used or on letterhead. (TR 543)

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Similarly, Lt. Ingalsbe, formerly Chief of the Environmental Section at the Academy, testified that he never authorized Complainant to sign external correspondence. (TR 970) There were documents that Complainant signed that went outside the office, the Lieutenant simply asked that they be routed through him. Lt. Ingalsbe did recall seeing miscellaneous internal documents signed by Complainant while he was Complainant's supervisor. He did not, however, recall seeing Complainant's signature on any external correspondence other than transmittal letters²¹ (TR 869, 975) and stated that Complainant would have had no occasion to sign documents on Academy letterhead with by direction of authority.²² (TR 981) While the Lieutenant admitted that he never directly told Complainant not to sign documents, he also stated that he was "fairly confident" that he and Complainant discussed the office procedures.

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No where in Complainant's position description does it specifically grant Complainant the authority to sign any documents. (TR 778; CX 7) Similarly, no where does it state that he cannot sign any documents. Complainant stresses that Lt. Ingalsbe told Complainant that he could sign documents going outside the Academy. (TR 778) Complainant later qualified this

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statement, however, when he testified that Lt. Ingalsbe "didn't stop [Complainant]"; and that "[the Lieutenant] probably knew about it." (TR 793, 830) Complainant interpreted this as an indication that he had the authority to so sign. Complainant is not aware of any other person within his chain of command being aware that he was signing correspondence going outside the Academy.

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This Judge notes that Complainant was issued a meritorious rating on job element 2 in his April 1995 performance appraisal (CX 24), wherein Lt. Ingalsbe noted in particular "[Complainant's]...interactions with representatives from the CT DEP and the EPA and the April 1996 appraisal (CX 25a), in which the Lieutenant noted that Complainant "effectively communicated with the DEP and our contractors on the requirements to complete the projects."

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Attorney Douglas Frey, who is presently employed as a civil engineer by the U.S. Coast Guard Department of Transportation and who has had environmental training in certain matters (TR 328-329), has worked at the Academy for the past ten years and testified that there was an "abrupt" change in his duties in 1992. (TR 331, 416-417) At that time, Mr. Carabine instructed Mr. Frey, a self-described environmentalist, that he would no longer be performing the environmental facet of his position.²³ As HAZMAT officer, Mr. Frey had occasion to report concerns to the CT DEP and/or the EPA. Mr. Frey had called the hotline to let them know he had done everything he could to convince the command to do what had to be done and the agency then sent an inspector over to the Academy. The CT DEP never asked Mr. Frey for anything in writing and he never, of his own initiative, followed up with a writing. (TR 389-390)

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Mr. Frey testified it was not enough for one man to do the environmental compliance work at the Academy, especially as he was "doing battle" to do the right thing with the leadership at the time. (TR 334) In Mr. Frey's opinion, the Academy seized an opportunity to remove him from his hazardous material duties and replace him with "someone who would pursue the Academy's interests rather than" his own concerns as an environmentalist. (TR 332) There was a lot of friction between himself and upper management over anything to do with the environment. (TR 333) In particular, Mr. Frey noted this friction in the context of when an issue was about to go outside of the Academy; in other words, when someone was about to rock the boat. (TR 333, 401) Mr. Frey described an environment where it was priority to keep all problems "inside" and to keep quiet. (TR 333, 347, 401) Mr. Frey stated environmental matters did not make the list of priorities for the chain of command.²⁴ (TR 342)

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While Mr. Frey was operating the hazardous material section at the Academy, he signed two types of documents, hazardous waste manifests and a Form 1348, which was a form sent from the Academy to the submarine base in an effort to get rid of hazardous waste. (TR 352-353, 384) Mr. Frey was told that he could not sign any documents without sending them through

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Mr. Carabine. (TR 353) If Mr. Frey had signed something, other than the aforementioned, and

sent it out, he would have had to have answered for it. (TR 384) Mr. Frey does not recall relaying this rule to Complainant, although it might have been possible that he did. Mr. Frey described the rule as "common knowledge" because nobody could send things out of the office. (TR 354, 385, 397-398) Not only was it common knowledge, but Mr. Carabine had directly told Mr. Frey not to send anything out without his signature. Mr. Frey doubts that Complainant would have any authority to sign any documents.

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Mr. Frey's office was located in close proximity to Complainant's office and he stated he observed Complainant's relationship to his supervisors on occasion. Mr. Frey described the relationship as "not fun" and not that professional. (TR 399)

Complainant had a lot of trouble with Mr. Carabine, such that Mr. Frey described it as obvious to the whole office. (TR 400) Mr. Frey stated these problems were rooted in Complainant's effort to bring the Academy into compliance and the resistance he was getting from Mr. Carabine. (TR 400) Mr. Frey described a specific example of a meeting in 1996 where Mr. Carabine tried to interfere with Complainant's ability to "get the word out" on how to deal with hazardous materials and that Complainant was not going to take it sitting down. (TR 402)

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Mr. Frey, who initiated the taking of samples and conducting of a lab report on the North Site, did not obtain permission for the tests because he was not sure that anyone would authorize it. (TR 357-358) He received the lab results (CX 28²⁵) sometime shortly after October 8, 1992, which results indicated to him that the area was hazardous and indicative of a CERCLA issue, rather than an RCRA issue. (TR 381) Mr. Frey, who specifically told Mr. Carabine that the North Site was contaminated and who was aware that there was personal liability for his responsibilities as hazardous materials officer (TR 362), went through the chain of command as far as the lab results were concerned because *he was "directed," by Mr.*

Carabine, "not to have any contact directly with the DEP." "</I> (TR 411-412) Mr. Frey is of the opinion that the results should have been reported to somebody, either the EPA or the CT DEP. Mr. Frey authored a memorandum prior to 1993, at the behest of Admiral Kozak,²⁶ listing things that were not in compliance and included the North Site on this list. (TR 362-363, 374)

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Mr. Carabine, who is presently Mr. Frey's direct line supervisor, has yelled at Mr. Frey for calling the DEP for assistance in getting the Academy to do "the right thing with the environmental program." (TR 349) According to Mr. Frey, Mr. Carabine was upset that an unspecified environmental issue had gotten out and he was not happy that someone else was now going to be dealing with it. (TR 349) This Judge, upon observing Mr. Frey's demeanor at hearing and considering that he had no apparent personal interest in the outcome of this litigation, found Mr. Frey's testimony to be credible in all regards and I specifically credit his testimony on this point. Mr. Carabine, who would have been the appropriate person to testify to the contrary, did not appear as a witness at hearing.

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Lieutenant Christopher N. Zendan, Public Affairs Officer at the Academy, is aware of the North Site and testified that he has had no contact with Complainant and had not even seen him until a television interview a few days prior to his testimony. (TR 922, 929) As

employees. Complainant testified that Mr. Carabine made a comment that the people who did not have work to do could stay after the meeting so that Complainant could ask them if they also perceived a difference. Complainant did remain after the staff meeting, and he testified the other employees also did not remember the policy as written.³² Complainant stated Mr. Carabine stayed in the room while Complainant asked people and he was "intimidating" Complainant and other people by giving out this big laugh. (TR 752)

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Complainant eventually returned to his work area and was speaking with Ms. Campbell and Lt. Opstrup when Mr. Carabine came over. Complainant stated Mr. Carabine was "obviously upset" and Ms. Campbell described him as "ranting and raving." (TR 752, 912) Mr. Carabine told Complainant he was just not recalling the verbal instructions correctly and Complainant stated he would not engage in an argument because of his "present state," a reference to his medical condition. (TR 753) Complainant did state, however, that it was obvious to him that he was being retaliated against by being given AWOL. Mr. Carabine followed Complainant and started yelling at Complainant, stating it was insubordination that Complainant was walking away from Mr. Carabine while Mr. Carabine was trying to talk to him. (TR 754)

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Mr. Frey recalled a discussion which occurred in 1996 concerning the office leave policy. Complainant had called in sick and left a message with a secretary because neither Mr. Carabine nor Lt. Opstrup were in. Complainant questioned whether this was a change to what had been the previous policy, and Mr. Carabine responded this was his meeting and that if Complainant wanted a meeting he could call his own. (TR 369) Complainant attempted to discuss whether this was a change in existing policy, and Mr. Frey described there was some "heat" about him doing this. (TR 369) "There was quite a bit of tension." (TR 370) In Mr. Frey's opinion, the memo did reflect a change in the existing policy. (TR 370-371) Mr. Frey described a recent day, sometime in July 1997, on which he was out sick and left a message with the Secretary. (TR 392) Mr. Frey was not given AWOL. (TR 392)

<P><HR>[Page 29]<P>

Complainant documented this staff meeting and the subsequent encounter in a November 4, 1996 grievance to Captain Olsen. (CX 97) The memorandum recounts Mr. Carabine accused Complainant of having selective hearing. Complainant also indicates he wrote to the Captain because Captain Florin has a lack of interest in correcting the problem, as exhibited by his refusal to take any action.

<P>

Complainant filed two grievances on his AWOLs (CX 92, dated October 25, 1996; CX 97, dated November 4, 1996), one of which was resolved by Complainant electing to proceed along an EEO route. (TR 1080) Captain Florin, who was assigned to resolve the November 4 grievance (CX 103), reached a different conclusion as to what happened when Complainant challenged Mr. Carabine on the leave policy during the meeting. (CX 107) According to the Captain's inquiries, observers described Complainant as interrupting the meeting and stated that they were taken off guard by his persistence. They also described Mr. Carabine as restrained and professional during the exchange, although some said he was visibly angry because he was being challenged by Complainant.

Furthermore, the evidence establishes that this reportability issue was far from clear cut, with Respondent's legal department "waffling" on its recommendation not to report the site (CX 19, dated 7/2/96), and Lt. Opstrup, who ultimately followed the chain of command, personally holding the opinion that the Site should have been reported as the conservative, safer route. (CX 116)

<P>

Respondent has defended itself by arguing that there was no adverse employment action taken against Complainant. To wit, Respondent argues Complainant never had "By Direction of" signature authority in the first instance, nor did he have the title of Academy Environmental Engineer. **A fortiori**, Respondent argues, any comments made by Captain Florin were not adverse because they did not negatively effect Complainant's employment.

<P>

An adverse employment action can be in the form of tangible job detriment or a hostile work environment. **Smith v. Esicorp, Inc.**, 93-ERA-16, at p. 3 (Sec'y 3/13/96). In this case, Complainant's employment was adversely affected by the August 27, 1996 "discussion" between Complainant and Captain Florin about Complainant's signature authority and his representation of himself as the Academy's Environmental Engineer. I pause to note that Captain Florin's statement, which I find had the potential of changing Complainant's responsibilities at the Academy as he had up to that time exercised them, did not actually result in a change in Complainant's employment responsibilities as alleged. This is only because of Complainant's memorandum (CX 78), authored a mere two days after the meeting, wherein Complainant asserted he considered the discussion "nonbinding."

<P><HR>[Page 33]<P>

Nevertheless, this "discussion," which this Judge finds to have been in effect a verbal counseling session, was the culmination of Complainant's pursuit of environmental compliance and clearly exhibited the degree of animus which that insistence upon compliance generated. Complainant's job undoubtedly changed for the worse post-August 27. This animus is substantiated by Complainant's colleagues, such as Lt. Opstrup and Attorney Frey, who generally testified to Complainant constantly butting heads with his chain of command regarding compliance issues. Not surprisingly, Complainant's reaction to the stress of this work situation were a variety of physical ailments requiring him to take additional sick leave and leave under the FMLA. The additional leave was subsequently determined by Respondent to be a negative factor in Complainant's ability to complete the tasks assigned to him. The result was Complainant's Notice of Proposed Removal. **See Generally Boytin**, **supra** (wherein the Secretary noted that it was not necessary to analyze the case as a hostile work environment case since the actions of the respondent caused tangible job detriment). Complainant has, therefore, established that his employment was adversely affected by Respondent's actions, albeit not in the way that he had originally claimed.

<P>

The crux of this case is whether or not Respondent's adverse actions were based upon an unlawful motive. The situation presented at the Academy is reduced to this: there was a disagreement of minds as to whether or not the law required the North Site to be reported. Complainant can prevail only by proving, by a preponderance of the evidence, that the resultant adverse actions were motivated by Complainant's insistence on environmental compliance. If

failed to provide any evidence that suitable work existed for a person of plaintiff's qualifications); **Gallo v. John Powell Chevrolet, Inc.**, 779 F. Supp. 804, 813-814 (M.D. Pa. 1991), **aff'd**, 981 F.2d 1246 (3d Cir. 1992) (burden of proving that Title VII plaintiff failed to exercise reasonable diligence in seeking out other employment is on employer and that burden may be satisfied by proving that substantially equivalent positions were available and plaintiff failed to use reasonable care and diligence in seeking those positions; plaintiff has no obligation to submit evidence of reasonable diligence on her part until defendant has established those elements).

<P>

Despite evidence that Complainant Berkman was not restricted from performing work within his field for an entity other than Respondent (TR 823) and despite evidence that Complainant opted to work uncompensated for his time everyday per week at his wife's store (TR 100, 108), ³⁹ facts which would suggest

<P><HR>[Page 42]<P>

to this Judge that Complainant showed a wilful disregard for his financial interest, thereby breaching his duty to mitigate damages, Respondent has completely failed to offer evidence of the availability of comparable positions. Because Respondent has failed to meet its clearly defined preliminary burden in regards to mitigation, this Judge is unable to proceed to the latter step of the analysis, where the aforementioned evidence would heavily weigh in favor of Respondent.

<P>

Duplicative benefits must be deducted from a back pay award. The Secretary has held that no set-off is permitted in the absence of proof that a complainant's workers' compensation benefits were designed as compensation for lost wages during the particular back pay period at issue. **Williams v. TIW Fabrication & Machining, Inc.**, 88-SWD-3 (Sec'y 6/24/92). Federal Employees Compensation Act (hereinafter FECA) payments consist of "compensation," and are defined as a percentage of the employee's monthly salary. **Nichols v. Frank**, 42 F.3d 503, 515-516 (9th Cir. 1994). Accordingly, FECA payments are properly deducted from an award of back pay. **Id.** (holding Title VII back pay award was properly set-off by FECA payments).

<P>

Mrs. Berkman testified that Complainant was earning a salary of approximately \$55,000 per year while he worked for Respondent, which translates to approximately \$3,000.00 biweekly. She further testified that Complainant was earning approximately \$2,000.00 per month at the time of hearing. (TR 100) Assumedly, this is a reference to his FECA benefits because, as far as this Judge was informed, Complainant was not receiving income from any other source at that time. Although the mathematical inaccuracy of these numbers is at once apparent, Respondent did not question the amounts as sworn to by Mrs. Berkman. These numbers are, therefore, the numbers upon which any back pay award should be based. Complainant testified he will receive sixty percent (60%) of the salary he made while at Respondent during his first year after retirement and about forty percent (40%) per year thereafter under FECA. (TR 757)

<P>

Accordingly, in the event that a reviewing authority determines that Complainant was constructively discharged, this Judge would recommend Complainant be awarded back pay from February 14, 1997, the date he was last employed by Respondent, until

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<P><P><P><CENTER>[ENDNOTES]</CENTER><P>

¹One worker testified he wore no special protective gear when working in the area and that he had no specialized training to work there. (TR 134-135)

<P>²Lt. Opstrup reviewed Complainant's position description (CX 7) and stated he was unaware of any limitations placed on the position summary.

<P>³Lt. Opstrup stated that the language in Complainant's position description regarding ensuring environmental compliance meant that the employee had to notify the office up through the chain of command. (TR 540)

<P>⁴Factor 6 indicates, among other things, that "outside contacts regularly include Federal, State and local agencies..." (CX 7 at p. 5)

<P>⁵Commander Florin is now Captain Florin and shall be so referred to in this Recommended Decision and Order. His status at the time of the incidents in question, however, was that of Commander.

<P>⁶In this regard, Complainant noted it was very, very inefficient management of the environmental office to have an inexperienced person like Lt. Opstrup as a buffer between Complainant and his second line supervisor. (TR 587-588) The Captain recalled discussing with Complainant that the environmental office would be reorganized (TR 1024) and that Complainant asked a few times, beginning in or around September 1995, to have regular meetings with regard to environmental issues. (TR 1047)

<P>⁷Complainant acknowledged one particular compliance issue which was acted upon, but noted it was only after a lag and resistance. (TR 587)

<P>⁸Complainant stated the handwriting on that exhibit was probably not there when he first saw the document.

<P>⁹Complainant's draft of the reporting letter was returned to him with comments written in red in the margins. Lt. Ingalsbe told Complainant that the handwriting was that of Admiral Versaw. (TR 477, 601) Lt. Opstrup testified that the Admiral never asked Lt. Opstrup if there was a basis for the statements or for supportive statements or for dates. (TR 480)

<P>¹⁰Fuss & O'Neill, an environmental consulting firm, was called in to double check the Academy's determination that the

Site did not need to be reported. (TR 1054) A document prepared by Fuss & O'Neill describing the differences between the reporting requirements was received at the Academy in September 1996. (TR 1039-1040)

<P>¹¹Captain Florin recalled that in the summer of 1996 there was discussion about the proper wording to be put on the sign to hang at the North Site, which resulted in the word 'contaminated' being removed, and whose signature should go on it. (TR 1047)

<P>¹²When Mr. Adams dug up the drum, he smelled a definite odor, a very strong smell. (TR 204) Mr. Adams continued to dig and he hit another drum. His supervisor instructed him to stop digging while he went to speak with his supervisors. When the supervisor returned, he instructed Mr. Adams to cover-up the drums. (TR 204) Approximately two weeks expired and Mr. Adams was instructed to return to the area and to dig the barrels up again. Again, he was instructed to bury them and erect a fence.

<P>¹³At the subsequent meeting with the grounds shop, which Complainant indicated was apparently ordered by the command to try to smooth things over, Complainant continued to hold his grounds. He was honest, and he did not withhold anything from the shop. Complainant stated the Lieutenant apologized after attending the second meeting for himself and Complainant stated this may have been because he realized Complainant was not inciting them, he was merely answering their questions honestly. (TR 704) From this point on, however, Complainant was restricted from giving training by himself and Lt. Opstrup's attendance was required.

<P>¹⁴Complainant testified that calling the Site in was part of his job. (TR 731)

<P>¹⁵Complainant informed the clerk at the National Response Center of his identity and where he worked. The clerk never asked whether Complainant was calling in his professional capacity or as an individual. (TR 798)

<P>¹⁶According to Complainant, Captain Florin definitely told Complainant not to sign things going outside the office. Complainant notes that even if he said 'division,' the effect is the same, in that it curtails Complainant's effectiveness in his job. (TR 832-833)

<P>¹⁷The Captain, however, had been informed that Complainant had called in the North Site. He had no intention of signing the draft letter. (TR 1069) Neither the Captain nor Mr. Carabine would sign it because they were of the opinion that there was no need to report the Site. (TR 1070) The Captain eventually ended up sending a letter to the State 'to focus the state's attention to' the Captain's 'office on what we were doing with regard to the North Site.'¹ (TR 1073)

<P>¹⁸The Captain testified he

¹Sawyer states he never received that document.

thought Complainant understood what he meant when he told Complainant that he did not have signature authority to send correspondence outside the Academy (TR 1003) and that Complainant did not indicate otherwise and did not ask any question as to what was meant.

<P>¹⁹Indeed, this Judge notes the September 12, 1996 letter to Section Chief, Emergency Response Section, for an environmental determination. (CX 83) The letter is signed "P.D. Berkman, Environmental Engineer, U.S. Coast Guard Academy." The initial draft, intended for Mr. Carabine's signature by direction of the Superintendent, was refused by the command. There is no evidence of record that Complainant was counseled about his title and/or signature authority, despite the fact that this letter is signed nearly identical to the letter which was sent to the CT DEP. I also note, however, that this letter was not sent on Academy letterhead.

<P>²⁰A hazardous waste manifest is a receipt that indicated that identified waste was sent to a specified location offsite. As part of these manifests, an individual was required to certify that he or she is working on a waste reduction program, that it is done to the best of his or her knowledge, and that he or she is trying to reduce the waste that is produced. Complainant had authority to sign these manifests, which are "serious" documents. (TR 513)

<P>²¹Transmittal letters are not official Academy correspondence, they are like a fax cover sheet. (TR 984-985)

<P>²²The Lieutenant cannot recall seeing any such documents signed by Complainant. (TR 974)

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<P>²⁷CX 59, dated May 1, 1996, further complains of Mr. Carabine reducing Complainant's responsibilities in regards to the Tank

Consolidation project and states "this is again clearly based on [Mr. Carabine's] personal hatred and bigotry." (CX 59)

<P>²⁸The record lacks evidence of any similarly situated employee. I briefly pause to note the evidence that a Mr. Zimba from contracting was allowed to perform work at home and hasten to add that the extent of that work and the regularity with which it was performed at home is unspecified.

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<P>³³I pause to note that Complainant's attention at hearing was directed to the general policy section under disciplinary and adverse actions, the incorrect part of the personnel manual. Complainant's attention would have more appropriately been directed to the section regarding notice of proposed removal based on unacceptable performance.

<P>³⁴Nobody in specific gave Complainant this ultimatum. He references a letter that was sent to Attorney Sawyer that stated, in essence, sign this retirement form and we will drop the Notice of Proposed Removal. (TR 772)

<P>³⁵To this extent, the evidence regarding whether the Federal Facilities Compliance Act (FFCA), enacted in 1992, did affect whether or not the North Site was reported is moot in the context of this proceeding. Suffice it to note, however, that the testimony was that the FFCA did not affect whether or not the North Site was reported. (TR 577-578)

<P>³⁶In this regard, this Judge does not find the Captain's testimony that the Academy was in environmental compliance as of January 8, 1997 to indicate that Complainant's removal was not necessary. (TR

authorities are of the opinion that Complainant was constructively discharged, a finding which this Judge specifically rejects, I would recommend (1) back pay as specified at p. 44 of this Recommended Decision and Order; and (2) reinstatement to the position of Environmental Engineer, GS-819-12, with the same terms, privileges and conditions of employment as previously enjoyed.

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<P>³⁶In this regard, this Judge does not find the Captain's testimony that the Academy was in environmental compliance as of January 8, 1997 to indicate that Complainant's removal was not necessary. (TR 1021) Respondent was not required to wait until such time as it fell out of compliance to replace an employee who had not been performing to appropriate standards. This Judge would have been more persuaded by evidence as to whether or not Respondent has actually replaced Complainant with a full-time employee and, if so, how quickly that was done.

<P>

<P>³⁷I pause to note that the Secretary has adopted the majority position for determining whether or not there has been a constructive discharge. As was succinctly stated in the matter of Hollis

v. Double DD Truck Lines, Inc., 84-STA-13, at p. 4 (Sec'y 3/18/95), it is not necessary to show that the employer intended to force a resignation, only that he intended the employee to work in the intolerable conditions. **Cf. Martin v. Cavalier Hotel Corp.**, 48 F.3d 1343 (4th Cir. 1995) (representing the minority view that an employee must prove the actions of the employer were intended by the employer as an effort to force the employee to quit).

<P>

<P>³⁸This Judge has not determined whether the Notice of Proposed Removal was discriminatory because to reach that point of the analysis would presuppose that Complainant was issued an ultimatum as he contends. I pause to note, however, that Respondent contends that it issued Complainant's Notice of Proposed Removal because of his inability to perform the critical functions of his position on a full-time basis. On the one hand, Complainant's inability to work full-time, however, was nothing more than the result and manifestation of his protected activity. **See Generally Dodd**, **supra** (wherein the Secretary held complainant's insubordination and poor attitude were nothing more than a manifestation of his dissatisfaction with management's commitment to environmental concerns). Complainant was under Doctor's orders to work not more than twenty (20) hours per week *in the office environment* because the harassment he was subjected to in that environment were the cause of his medically diagnosed major depression. On the other hand, Complainant has himself recognized that the Environmental Office is understaffed and has an overwhelming work load. (CX 47)

<P>³⁹Mrs. Berkman owns a store in Mystic called Seaport Imports and it sells furniture, glassware and pottery. Complainant works there, fixing furniture, from 10:00 a.m. until 6:00 p.m. about everyday per week, including Saturday and Sunday. He is not, however, paid for his services.

<P> No doctor, as far as Complainant knows, has ever indicated that he could not do forty hours of work per week. (TR 823) The Doctor informed Complainant he could not do forty hours at the Academy because that is the environment that caused his illness. (TR 823)

<P>⁴⁰In regards to her testimony that her husband's work was squelched, she stated an ex-supervisor, Lt. Ingalsbe, told Complainant that he was no longer responsible and that he was only to focus on a particular program and no longer do other things. (TR 109) According to Mrs. Berkman, this squelching was frequent (TR 112) and there were oft times that Complainant would go to do something and be told not to do it.

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event that reviewing authorities are of the opinion that Complainant was constructively discharged, a finding which this Judge specifically rejects, I would recommend (1) back pay as specified at p. 44 of this Recommended Decision and Order; and (2) reinstatement to the position of Environmental Engineer, GS-819-12, with the same terms, privileges and conditions of employment as previously enjoyed.

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